ITT Industries, Inc. *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), AFL–CIO. Case 7–CA–40946

May 13, 2004

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On May 5, 2000, the National Labor Relations Board issued its Decision and Order in this proceeding.[1] The Board found, inter alia, that the Respondent violated Section 8(a)(1) of the Act by prohibiting handbilling by its offsite employees in its parking lot.

Subsequently, the Respondent filed a petition for review of the Board's Order with the United States Court of Appeals for the District of Columbia Circuit and the Board cross-petitioned for enforcement. On June 5, 2001, the court vacated the Board's decision that the Respondent had committed an unfair labor practice by prohibiting offsite employees from handbilling in its parking lot, and remanded the case to the Board for further proceedings consistent with its opinion.[2]

By letter dated November 15, 2001, the Board notified the parties that it had accepted the remand and invited the parties to file statements of position. Thereafter, the Respondent, the General Counsel, and the Charging Party each filed position statements.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the court's remand and finds, for reasons explained below, that the Respondent violated Section 8(a)(1).[3]

Background

The Respondent manufactures automotive and related products, and has three facilities in Oscoda, East Tawas, and Tawas City, Michigan. Approximately 600 employees work at the Oscoda plant, and approximately 180 at each of the other two plants. All three plants are within a short commuting distance of each other,[4] and employees have transferred from one plant to another over the years.[5]

a. Relevant facts

In 1994, the Union began an organizing drive among the Respondent's employees for a single unit consisting of employees in the three plants. The Union lost an election held on March 30, 1995, and thereafter filed objections and unfair labor practice charges. The Board set aside the election, finding that the Respondent engaged in unfair labor practices and objectionable conduct.[6] However, on June 10, 1998, while the case was pending before the Sixth Circuit, the Union filed a second petition for a three-plant unit. Thereafter, the Union filed an unfair labor practice charge in the instant proceeding, and on July 25, 1998, withdrew the new petition.

On April 28, 1998,[7] approximately seven employees from the Respondent's Oscoda plant handbilled in support of the Union in the parking lot of the East Tawas plant. The handbills described employee rights under the Act. The handbillers also asked employees to sign an organizing petition. The parking lot at the East Tawas plant is surrounded by a 6-foot high cyclone fence and has approximately 110 parking spaces. The gates to the parking lot are locked on the weekends but not during the week.[8]

The superintendent of the East Tawas plant, Jeffrey Minnick, told the handbillers they were on private property and had to leave. When the employees identified themselves as employees of the Respondent from its Oscoda plant, Minnick told them they had to handbill outside the fence.

On May 14, about eight of the Respondent's Oscoda employees again handbilled on the parking lot of the East Tawas plant.[9] After they identified themselves as employees of the Respondent's Oscoda plant, Minnick again told them they had to leave the parking lot.

The success of these offsite efforts was mixed. On April 28, about a quarter of the 50 or 60 cars entering or exiting the parking lot during the hour that the handbillers were present stopped for the handbillers. On May 14,

[1] 331 NLRB 4.

[2] *ITT Industries v. NLRB*, 251 F.3d 995 (D.C. Cir. 2001).

[3] We shall substitute the attached notice for that set out in the judge's decision, in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[4] The East Tawas facility, located between the Oscoda facility and the Tawas City facility, is approximately 14 miles from the former and 5 to 6 miles from the latter.

[5] For example, in 1998, 18 employees were transferred between the three plants.

[6] *ITT Automotive*, 324 NLRB 609 (1997), enfd. in relevant part 188 F.3d 375 (6th Cir. 1999).

[7] All dates hereafter are in 1998 unless otherwise stated.

[8] The plant is open 24 hours a day during the week and is closed on weekends.

[9] On each occasion, the Oscoda employees wore union insignia.

no more than 3 out of 20 or 30 cars stopped at the side gate during an hour of attempted handbilling.[10]

The Respondent asserts that the offsite employees were prohibited from handbilling in its East Tawas parking lot because of security concerns. In support of its assertion, the Respondent cites its strict policy of not allowing persons not employed at the East Tawas facility onto that facility.[11] The one exception to this rule is that relatives and friends of employees are allowed to drive onto the parking lot to drop off or pick up employees. However, the relatives or friends are not allowed to get out of their vehicles. The Respondent also states that its concerns about security are warranted because of various incidents of vandalism that occurred over the past few years. In 1996 or 1997, the window of a car was shattered. Also in 1996 or 1997, the lug nuts on a supervisor's vehicle were loosened a week after the supervisor had discharged an employee.[12] The record also establishes that, at unspecified times, tires were slashed and a stranger came onto the property to fight with an employee after he got off work. Further, in December 1997, the estranged husband of one of the Respondent's employees telephoned the Respondent's receptionist to say that he had a gun and was coming after his wife. After this last incident, the Respondent conducted an investigation and installed a cyclone fence. The fence encloses the plant and is locked at night.[13]

b. The Board's original decision

In its original decision, the Board adopted without comment the judge's finding that the Respondent had violated Section 8(a)(1) of the Act by prohibiting handbilling by its offsite employees in its parking lot.[14] The judge applied the standard, set forth in *Tri-County Medical Center*,[15] that prohibits an employer from denying off-duty employees entry to parking lots and other nonworking areas to handbill except where justified by business reasons. The judge relied on Board cases holding that an employer's employees from one plant are considered employees of the employer when they handbill at another of the employer's plants.[16]

With regard to the Respondent's asserted business reason, its concern about vandalism, the judge recounted evidence of vandalism to vehicles parked in the Respondent's parking lot, including, as described above, the shattering of a car's window and the loosening of lug nuts on a tire of a supervisor's vehicle in 1996 or 1997. The judge found this evidence "woefully inadequate" to warrant banning the handbillers from its parking lot. The judge cited in particular the Respondent's policy of allowing relatives and friends of employees to come onto the parking lot to drop off or pick up employees.[17] The judge concluded that the Respondent's prohibition of access to its parking lot for handbilling violated Section 8(a)(1). The Board affirmed the judge in this respect.

c. The D.C. Circuit's decision

On June 5, 2001, the court vacated the Board's decision and remanded the case "for further proceedings consistent with this opinion."[18] The court explained, "[W]e simply cannot assess the reasonableness of the Board's decision to apply the *Tri-County* test to off-site employees in the present case."[19] Noting that "[b]ecause it is by no means obvious that Section 7 extends nonderivative access rights to off-site employees . . . the Board was obliged to engage in considered analysis and explain its chosen interpretation."[20] The court commented that "[n]one of the Board's previous cases . . . take any account of the Court's different access decisions or the trespass considerations articulated therein."[21] The court, therefore, vacated the pertinent portion of the Board's decision and remanded it for the Board "to consider and craft its interpretation in light of these concerns."[22]

d. The Board's Decision in Hillhaven

Following the court's decision, the Board specifically addressed the court's concerns in *Hillhaven Highland*

[10] According to employee Sherry Spaulding, no vehicle stopped during that hour. However, according to employee Wayne Yoesting, "maybe three" vehicles stopped during that time.

[11] The court described this policy as having been instituted in March 1998 following installation of a 6-foot cyclone fence. *ITT v. NLRB*, supra at 997. However, we note that Minnick testified, "[T]hat's always been the rule."

[12] We correct the judge's inadvertent description of these incidents as having occurred "a few years earlier" and that the latter occurred "a few weeks" after the supervisor discharged the employee.

[13] On the issue of security, Minnick also testified that the Respondent does not have security cameras, nor has it requested the police to patrol the area. Minnick testified that the Respondent does not employ a full-time security person at the East Tawas facility, but that "everybody just kind of looks out for each other."

[14] The Board also found that the Respondent violated Sec. 8(a)(1) by disparately prohibiting an employee from talking about the Union and dismissed an allegation that the Respondent violated Sec. 8(a)(1) by a supervisor driving his vehicle close to handbilling employees. The D.C. Court affirmed this Sec. 8(a)(1) violation.

[15] 222 NLRB 1089 (1976).

[16] *Southern California Gas Co.*, 321 NLRB 551 (1996), and *Postal Service*, 318 NLRB 466 (1995).

[17] The judge also noted, with regard to the strength of the Respondent's safety concerns, the absence of any security cameras, requests for the police to patrol the area, and Minnick's testimony (see fn. 13, supra).

[18] *ITT Industries v. NLRB*, supra at 1006–1007.

[19] Id. at 1004.

[20] Id.

[21] Id.

[22] Id. at 1005.

House,[23] which presented the same issue.[24] In *Hillhaven*, the Board stated, "[W]e are guided today by the court's decision" in *ITT Industries v. NLRB*, supra.[25] In a response to the *ITT Industries*' court's directive, the Board concluded:

> (1) [U] nder Section 7 of the Act, offsite employees (in contrast to nonemployee union organizers) have a nonderivative access right, for organizational purposes, to their employer's facilities; (2) that an employer may well have heightened private property-right concerns when offsite (as opposed to onsite) employees seek access to its property to exercise their Section 7 rights; but (3) that, on balance, the Section 7 organizational rights of offsite employees entitle them to access to the outside, nonworking areas of the employer's property, except where justified by business reasons, which may involve considerations not applicable to access by off-duty, onsite employees. To this extent, the test for determining the right to access for offsite visiting employees differs, at least in practical effect, from the *Tri-County* test for off-duty, onsite employees.[26]

With respect to the Section 7 rights of offsite employees, the Board stressed that when offsite employees seek to organize similarly situated employees at another employer facility, the employees seek strength in numbers to increase the power of their union and ultimately to improve their own working conditions. Regarding an employer's private property concerns, the Board recognized that an employer confronted by access claims of offsite employees may be faced with unique problems implicating security, traffic control, and the like. The Board found, however, that "an employer's property interests, as well as its related management interests, may be given due recognition without granting it the unqualified right to exclude offsite employees pursuing organizational activity."[27] In discussing the balancing of Section 7 rights and property concerns, the Board cautioned, "that an employer must demonstrate why its security needs or related business justifications warrant restrictions on access by offsite employees," and that it would review "an employer's proffered justification carefully, on a case-by-case basis."[28]

e. The Sixth Circuit's decision in Hillhaven Highland House

The Sixth Circuit enforced the Board's decision in *Hillhaven*,[29] holding that "the Board's finding that offsite employees enjoy Section 7 organizational rights of access that are nonderivative was reasonable under the law."[30] In particular, the court found significant the fact that "offsite and onsite employees share the same common concerns as to a specific employer, not only as to employment in general for purposes of garnering union support, but also on matters relating to such things as wages, benefits, and other workplace issues."[31]

Analysis

In accepting the court's remand of the issue, we are bound to regard its opinion as the law of the case and to follow the court's directive. However, as discussed above, the Board in *Hillhaven*, supra, addressed the court's directive to develop a balancing test between the property interests of an employer and the Section 7 organizational rights of offsite employees. Therefore, we need only apply that test to the facts of this case.

Applying *Hillhaven*, we find, for the following reasons, that the Respondent violated Section 8(a)(1) by denying access to offsite employees to handbill in its parking lot.

a. Section 7 Rights of offsite employees

As described above, the offsite employees here sought to handbill fellow employees as part of a campaign to organize the employees at the Respondent's three facilities, including the East Tawas facility. Thus, as offsite employees, they had a nonderivative right of access under *Hillhaven*.[32] Significantly, the offsite employees were seeking to organize the East Tawas employees in a single, three-plant unit which included their own Oscoda plant. Thus, the common concerns shared by the Respondent's onsite and offsite employees were even greater than those that existed in *Hillhaven*. As the Board acknowledged in *Hillhaven*, "[t]he offsite em-

[23] 336 NLRB 646 (2001), enfd. 344 F.3d 523 (6th Cir. 2003).

[24] In *Hillhaven*, the offsite employees seeking access were not in the same prospective bargaining unit as the onsite employees. However, the case presented the same issue insofar as it addressed whether, under Sec. 7 of the Act, offsite employees have a freestanding, nonderivative right of access to their employer's premises.

[25] *Hillhaven*, supra at 648.

The Board noted, at fn. 7, "On remand in *ITT Industries*, of course, the Board may wish to refine or supplement the analysis offered here, in response to the arguments made by the parties in that case."

[26] *Hillhaven*, supra at 648.

[27] Id. at 650.

[28] Id.

The Board further explained that "[i]n some cases, an influx of offsite employees might raise security problems, traffic control problems, or other difficulties that might well justify an employer's restriction (or even prohibition) of such access. Appropriate measures might also be justified, for example, to require apparent trespassers to identify themselves and thus to determine whether the person seeking access is, in fact, an offsite employee of the employer." Id.

[29] *First Healthcare Corp., v. NLRB*, 344 F.3d 523 (6th Cir. 2003).

[30] Id. at 538.

[31] Id.

[32] *Hillhaven*, supra at 649.

ployee's personal stake in organizing his counterparts at a different employer facility is clearest where he is, or will be, part of a multifacility bargaining unit that includes onsite employees."[33] Consequently the Section 7 rights at issue here are indeed substantial.[34]

b. The Respondent's private property concerns

Under *Hillhaven*, we must next assess the Respondent's business justification for its prohibition. Specifically, we must determine whether the Respondent's business reasons justify the infringement of the offsite employees' substantial access rights afforded them under Section 7.

As noted above, the Respondent contends that it prohibited access to its parking lot to the Oscoda employees based on security considerations, and cites in support its policy of denying access to persons not employed at East Tawas. The only exception to this rule is that relatives and friends of employees are allowed to drop off or pick up employees from work, but they are not allowed to get out of their vehicles when they arrive on the parking lot. The Respondent also cites the various incidents of vandalism to vehicles and the threats to personal security that occurred over the past few years. And, after an incident involving a threat to one of its employees, the Respondent conducted an investigation and had a cyclone fence installed around its property.

c. Balancing of Section 7 rights and property concerns

Although we agree that the record demonstrates that the Respondent had legitimate security concerns, we find these concerns do not justify the total exclusion of the Respondent's offsite employees from its parking lot.

First, the handbillers were not strangers to the Respondent; they were the Respondent's employees. Upon their arrival, on both April 28 and May 14, the offsite employees announced their identity as Oscoda employees and their purpose in being at the East Tawas facility. There is no evidence that the Respondent questioned their intent to handbill or their claim to be its employees.[35] Thus, as employees of the Respondent, their presence did not implicate the security concerns posed by the presence of nonemployees on the Respondent's property. Having identified themselves as employees of the Respondent, it was understood that they were subject to discipline if they engaged in vandalism or other misconduct. As was noted in *Hillhaven*,:[36]

> Surely it is easier for an employer to regulate the conduct of an employee—as a legal and practical matter—than it is for an employer to control a complete stranger's infringement on its property interests. The employer, after all, controls the employee's livelihood.

Second, the Oscoda employees attempted to handbill at 6 a.m., a time when there was a lot of activity in the parking lot. This was hardly a time when the parking lot was, therefore, open to unobserved vandalism, such as had occurred in the past. Further, there was absolutely no evidence of any misconduct or proclivity toward such misconduct by any of the Oscoda employees who were attempting to handbill.

In this regard, it is also significant that the Respondent did not install security cameras on its property, did not employ security guards to protect the premises, and did not request the police to patrol the area. Instead, according to Supervisor Minnick, the Respondent has an informal practice whereby "everybody kind of looks out for each other." Concededly, the decision to install cameras or hire security guards is an issue of the Respondent's own business judgment, and we do not seek to substitute our judgment for that of the Respondent. However, the Respondent has claimed that its security concerns warrant a rule that substantially curtails the Section 7 rights of its offsite employees. We find that the Respondent's claimed need for this rule must be afforded some degree of skepticism when there are other measures—that do not curtail Section 7 rights—that have not been taken because the Respondent believes that it is enough to satisfy security concerns that everyone "looks out for one another."

Third, there is no evidence, or claim, that the handbilling would cause any disruption to traffic in the parking lot. Further, the record fails to demonstrate the possibility of any unique logistical problems that might have arisen from the handbilling.[37]

In view of these factors, it is clear that the Respondent's complete refusal to allow handbilling by its own offsite employees was not reasonably tailored to address its concerns about protecting its property against vandalism or violence against its onsite employees. Weighing the Section 7 organizational rights of the Respondent's offsite employees against the Respondent's security concerns, we find that the Respondent has not met its burden, under *Hillhaven*, of demonstrating that its security

[33] Id.

[34] Id.

[35] The Respondent, of course, had the authority to require the Oscoda employees to specifically verify that they were its employees, which it did not do here. *Hillhaven*, supra at 650.

[36] Id. at 649.

[37] See *Hillhaven*, supra at 649–650, "employer's right to control the disputed premises likely implicates security, traffic control, personnel, and like issues that do not arise when only onsite employee access is involved," citing *ITT Industries v. NLRB*, 251 F.3d 1005.

needs warranted the absolute prohibition of handbilling on its property by offsite employees.

Our dissenting colleague asserts that the issue presented by this case is whether the Respondent's defense against vandalism and other misconduct is reasonable. We disagree. The issue is whether the Respondent has demonstrated why its defense against vandalism and other misconduct warrants an absolute ban on access to its property by its offsite employees. As we have discussed earlier, the Respondent's offsite employees enjoy a substantial Section 7 right to access to the outside, nonworking areas of the Respondent's property. The *Hillhaven* decision requires that the Respondent's security policy be analyzed in the *context* of its restrictions on that right. Thus, under *Hillhaven*, an employer's policy restricting access to its property may reasonably restrict the access of strangers, but may require "modification" when applied to the employer's offsite employees who have a statutory right to access. Our dissenting colleague apparently has misunderstood this principle. Under *Hillhaven*, employers' reasonable measures to protect against legitimate security threats do not "take a back seat" to employees' Section 7 rights. Here, the Respondent failed to show that the balance should be struck against all access of its offsite employees to the outside, nonworking areas of its property.

For all of the reasons set out above, we have found that the security concerns expressed by the Respondent do not justify the absolute restriction of access to offsite employees that the Respondent has imposed. We are mindful that our nation faces significant security risks.[38] We are equally mindful of our responsibility to protect the statutory rights of employees at such times, and at all times. The test established in *Hillhaven* does not "tamper with" employers' ability to address significant security risks. Contrary to our dissenting colleague, the test we apply here does not compromise employers' legitimate security concerns. Instead, it strikes a balance between an employer's security concerns and the Section 7 access rights of offsite employees by recognizing that an employer may have heightened private property-right concerns when its offsite, rather than onsite employees, seek access to its property, and by affording an employer the right to demonstrate why its security needs warrant restrictions on the access of its offsite employees to the outside, nonworking areas of its property. Applying the *Hillhaven* test here, we find that the Respondent has not shown that its concern over past acts of vandalism and two threats to onsite employees justifies an absolute restriction of the statutory access rights of its offsite employees.

Our dissenting colleague also asserts that the availability of other means of communication, specifically, the ability to handbill offsite, suggests that the Respondent's prohibition was permissible. Contrary to our colleague's contention, nothing in the Board's decision in *Hillhaven* mentions that the alternative means of access is a relevant consideration in determining the access rights of offsite employees. Moreover, our colleague's contention was specifically rejected by the Sixth Circuit in *Hillhaven*, which said that an inquiry into such considerations "is made only when *nonemployees* are on the employer's property."[39] Furthermore, the issue of the availability of alternative means of communication was not fully litigated by the parties.

In sum, the Respondent's offsite employees had a freestanding, nonderivative right under Section 7 of the Act to handbill in the Respondent's parking lot at the Respondent's East Tawas facility, and the Respondent has failed to present a business reason sufficient to justify prohibiting their access to the parking lot. Accordingly, we reaffirm the Board's earlier finding that the Respondent violated Section 8(a)(1) of the Act by prohibiting handbilling by its offsite employees in its parking lot.

ORDER

The National Labor Relations Board reaffirms the Board's original order, reported at 331 NLRB 5, as modified below, and orders that the Respondent, ITT Industries, Inc., Tawas City, Michigan, its officers, agents, successors, and assigns shall take the actions set forth in that Order as modified.

[38] Our dissenting colleague bases his conclusion that the Respondent properly imposed an absolute ban on access to its parking lot in part on his observation that the nation now faces significant security risks and employers must be particularly vigilant at this time of our nation's history. The Respondent does not claim, nor is there any record evidence, that any increased risk that might exist with respect to our nation's general security has any bearing on this case the events of which occurred in 1998. As far as we are aware, parking lots in automotive product plants in Michigan have not been identified as likely terrorist targets. It is our hope that Board Member concerns over national security do not become a mantra used to justify unfounded limitations on important employee rights.

[39] *First Healthcare Corp. v. NLRB*, supra, 344 F.3d at 541. In this regard, we find that our colleague's reliance on *Scott Hudgens v. NLRB*, 424 U.S. 507 (1976), is misplaced. In that case, "the property interests impinged upon . . . were not those of the employer against whom the [Section] 7 activity was directed, but of another [i.e., the owner of a shopping mall]." 424 U.S. at 522. Here, by contrast, the offsite employees were seeking access to the property of their own employer, who—as noted above—was aware of their employment status and of the possibility for discipline if they engaged in misconduct.

1. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. May 13, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT deny our off-duty employees access to our parking lots for the purpose of engaging in the distribution of union campaign materials.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL permit off-duty employees, whether or not those employees are assigned to any particular facility, access to our parking lots for the purpose of distributing union campaign materials.

ITT INDUSTRIES, INC.

CHAIRMAN BATTISTA, dissenting.

Contrary to my colleagues, I do not find that the Respondent violated Section 8(a)(1) of the Act by prohibiting its offsite employees from handbilling at its East Tawas parking lot.

The Respondent, for valid security reasons, has a policy which forbids access to the plant to all persons who do not work at the plant. The issue is whether the Respondent must modify that policy so as to permit employees who work at other sites to come onto the property to engage in Section 7 activity. I would not require the Respondent to modify its policy.

The Respondent's property has been subjected to incidents of vandalism, violence, and threats of violence in the past. Specifically, there have been several incidents of damage to vehicles, an incident involving a person who entered the property to physically confront an employee, and a threat to shoot an employee. These incidents clearly demonstrate substantial security concerns, and a need to limit access to those who work at the facility.

The security measures undertaken by the Respondent bore no relation to any protected concerted activity. To the contrary, the Respondent has long prohibited, from the premises, persons who are not employed at that facility. Thus, the policy is not aimed at employees, much less employees who are engaged in Section 7 activity. Indeed, an employee of the East Tawas plant can engage in Section 7 activity on that property. An employee of another plant cannot engage in any activity at East Tawas, irrespective of whether the activity is Section 7 or not.

Plainly, the Respondent's access policy was developed solely in response to its security concerns. The Respondent reasonably sought to protect its property and to ensure the safety of its employees. Thus, the Respondent's business concerns were far more serious than those at issue in *Hillhaven Highland House*, 336 NLRB 646 (2001), enfd. 344 F.3d 523 (6th Cir. 2003). In that case, the employer merely contended that prohibiting access to the offsite employees was necessary in order to provide for the "welfare, peace, and tranquility" of its nursing home residents," even though the offsite employees would not have entered the nursing home and thus would not have likely come into contact with the nursing home residents.[40] In the instant case, the Respondent was not relying on mere speculation, but rather on actual events of vandalism and threats of physical harm.

My colleagues contend that there were other measures that the Respondent could have undertaken to deal with its security concerns. In this regard, my colleagues suggest surveillance cameras, security guards, discipline of employees who engage in misconduct, and restricting access only during times when vandalism is more likely. My colleagues thus substitute their own governmental judgment for that of the Respondent. In my view, the issue is whether the Respondent's defense against van-

[40] *Hillhaven*, supra at 650.

dalism and other misconduct was reasonable. The fact that my colleagues believe that a different defense would be more reasonable is quite beside the point.

My colleagues further contend that even if the Respondent's response to the vandalism is reasonable, it nonetheless violates Section 8(a)(1) because it represents an "absolute" ban of access by the offsite employees. In other words, my colleagues would prohibit even reasonable measures to protect against legitimate security risks. Thus, my colleagues' holding, taken to its logical conclusion, warrants the inference that reasonable measures to protect against legitimate security threats must take a back seat to employees' Section 7 rights. I strongly disagree. In balancing Section 7 rights against security measures, I strike the balance here in favor of the latter. The employees have many other means to convey their message, and the Respondent had substantial security interests which it sought reasonably to protect. The Act does not command that legitimate security concerns must be compromised in order to afford employees additional opportunities to engage in union organizing.

My view is grounded firmly in property rights and entrepreneurial prerogatives. In addition, I note that our nation now faces significant security risks. Employers (and the rest of the public) must be particularly vigilant at this time of our nation's history. This is not the time to tamper with an employer's security policies.

I recognize that the Respondent has not claimed an increased risk in our nation's national security as a basis for the security measures it has taken. However, I am concerned that my colleagues' decision today suggests that any legitimate security concern by an employer—including one related to national security—could be compromised by the desire to expand employees' opportunities to engage in activity otherwise protected by Section 7 of the Act.

Interestingly, my colleagues fault the Respondent for not exploring alternative means of security, but at the same time they ignore the fact that the offsite employees had alternative means of communicating with the onsite employees. My colleagues create this double standard for a very good reason. There were numerous alternative means. To begin with, there were numerous alternatives away from the site (e.g. homes, taverns, etc). Further, the employees were able to handbill just a few feet outside the gates. At one such location, at least one-fourth of the drivers stopped to take the union literature. The fact that others declined to take the literature does not establish that the others were unable to take it if they wished. Thus, despite the Respondent's access rules, the free exercise of Section 7 rights occurred just a few feet away, all the while preserving the security needs of the Respondent.

I recognize that, in *Hillhaven*, the Sixth Circuit said that the Board was not "required" to consider the existence of alternative means of access. Even accepting that view, the Board is not *precluded* from considering that matter. Indeed, in *Scott Hudgens v. NLRB*, 424 U.S. 507 (1976), a case involving employees from another site, the Court instructed the Board to take all factors into account in accommodating Section 7 rights and property rights. And the Board, on remand, expressly considered alternative means of access.[41]

For all the above reasons, I find that the Respondent's property rights and security concerns, plus the employees' alternative means of access, outweigh the Section 7 rights involved herein. Thus, the Respondent could prohibit its offsite employees from handbilling on its East Tawas parking lot. Accordingly, the Respondent's prohibitions did not violate the Act.

Dated, Washington, D.C. May 13, 2004

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

[41] *Scott Hudgens*, 230 NLRB 414, 417 (1977). I cite *Hudgens* only for the proposition that the balancing should include the factor of "alternative means of access."